IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

HENRY BARNUM,

Respondent.

CASE NO. SC03-1315

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Henry Barnum, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of four volumes. The two volumes of the record will be referred to by the symbol "I" and "II" and the two volumes of trial transcripts will be referred to by the symbol "TI" and "TII". Each symbol will be followed by any appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

In 1992, the State charged respondent by information with armed robbery with a firearm, attempted first degree murder of a law enforcement officer, depriving a law enforcement officer of a weapon, grand theft of a firearm and use of a firearm in the commission of a felony. (I.4-5). On June 11, 1993, respondent was tried before a jury. (TI, TII). Respondent did not request that the court instruct the jury that he must have knowledge that a person was a law enforcement officer to be convicted of attempted murder of a law enforcement officer, (TII.212-235), and the trial court did not sua sponte give a

knowledge instruction. (TII.296-300). The jury found respondent guilty as charged of all of the offenses. (I.15-21).

Respondent appealed his conviction to the First District Court of Appeal. Although respondent's "attorney did not raise the knowledge issue at trial, []it was a disputed fact and appellant asserted fundamental error on appeal, because the state had failed to prove as an essential element that he knew the victim was a law-enforcement officer" Barnum v. State 849 So.2d 371, 373 (Fla. 1st DCA 2003). The First District affirmed the attempted murder conviction. Barnum v. State, 662 So. 2d 968 (Fla. 1st DCA 1995).

On December 19, 1997, respondent filed a motion for post-conviction relief in which he alleged that he was denied due process of law because the element of knowledge that a person was a law enforcement officer was omitted from the jury instructions, and his attorney was ineffective for failing to request an instruction on the knowledge element. (I.112). Respondent, when represented by counsel, moved to enlarge the claim and argued that omitting the jury instruction on knowledge was a legal error under Thompson v. State, 695 So. 2d 691 (Fla. 1997), which should be applied retroactively. (II.255). The circuit court's order denying respondent's motion for post-conviction relief stated in part:

> In 1997, the Florida Supreme Court held that knowledge that the person was a LEO was an element of the offense of attempted murder of a LEO. Thompson v. State, 695 So.2d 691 (Fla. 1997). The Supreme Court has not ruled that Thompson is retroactive. The

> Fourth District Court of Appeal has ruled that Thompson is not retroactive. Sweeney v. State, 722 So.2d 928 (Fla. 4th DCA 1998), rev. denied, 733 So.2d 517 (Fla. 1999).
>
> This Court does not find Defendant's argument that Sweeney is not controlling case law persuasive. Defendant attempts to distinguish Sweeney on its facts and argues knowledge was not a disputed element in that case as in the instant case. However, the issue raised in Sweeney was whether Thompson is retroactive. The Fourth District applied a *Witt v. State*, 387 So.2d 922, 931 (Fla.1980), analysis to determine if Thompson should be applied to the facts of the case. The Fourth District held that Thompson did not satisfy the second prong of the Witt test and thus did not apply retroactively. Sweeney at 931. Pursuant to Pardo v. State, 596 So.2d 665, 666 (Fla. 1992), a trial court must follow the decision of any district court until its own district court or supreme court rules. Accordingly, Thompson does not apply retroactively to this case. Additionally, counsel cannot be deemed ineffective for failing to anticipate changes in the law. As already indicated, at the time of Defendant's trial, knowledge was not an essential element of the crime. Therefore, counsel's failure to request an instruction on knowledge was not deficient representation, since such an instruction was not required under the law in effect at the time of trial. See Villacicencio v. State, 719 So. 2d 322, 324 (Fla. 3rd DCA 1998)(The use of case law not known at trial in support of an ineffective assistance of counsel claim is inappropriate).

(II.293-294).

Respondent appealed to the First District Court of Appeal, and the First District held that:

> We decline to follow Sweeney in this case, because the Fourth District did not consider Moreland v. State, 582 So.2d 618 (Fla.1991), which we find controlling. The supreme court stated in Moreland that fundamental fairness may require the retroactive application of a decision, even when a Witt analysis might favor finality. Moreland was convicted of first-degree murder and sentenced to life in prison. He claimed at trial and on appeal that African Americans had been unconstitutionally excluded from his jury pool pursuant to an administrative order dividing Palm

Beach County into eastern and western jury districts. While his appeal was before the Fourth District, a defendant who was convicted of murder and sentenced to death in Palm Beach County raised the same issue on appeal to the supreme court. After the Fourth District affirmed Moreland's conviction and sentence without an opinion, the supreme court issued Spencer v. State, 545 So.2d 1352 (Fla.1989), holding that the jury districts in Palm Beach County were unconstitutional.

Moreland filed a motion under rule 3.850, asking to have his conviction and sentence vacated under Spencer. The trial court applied Spencer retroactively, but the Fourth District concluded that it was an evolutionary refinement under Witt that could not be made retroactive. The supreme court agreed that Spencer was not a major jurisprudential change, but nevertheless reversed, stating that it would apply the case to Moreland's situation based upon fundamental fairness and uniformity of adjudications. "If Moreland had been sentenced to death, he would have appealed to this Court, rather than the district court, and would have obtained the same relief as Spencer[,]" and it would be fundamentally unfair to deny the same relief to Moreland "because his sentence directed his appeal to a court other than this one." Moreland, 582 So.2d at 620. Accord Fannin v. State, 751 So.2d 158 (Fla. 2d DCA 2000); Benedit v. State, 610 So.2d 699 (Fla. 3d DCA 1992).

In the case at bar, if this court had certified conflict with Grinage in Barnum's direct appeal, the supreme court could have considered Barnum's case, decided it in the manner it did Thompson, and remanded for a new trial. We therefore reverse, and certify conflict with Sweeney.

In deciding this case, we have considered State v. Klayman, 835 So.2d 248 (Fla.2002), and Bunkley v. State, 833 So.2d 739 (Fla.2002), in which the court explained that supreme court decisions that "clarify" statutory law apply to all cases, pending or final, while decisions that "change" the law require a Witt analysis. We are unable to reconcile Thompson with either category. Section 784.07(3) did not contain broad terms evincing that the legislature expected the courts to engage in judicial construction, but instead used language that was intended to include a knowledge requirement from the date of the law's enactment, which, under Klayman, would indicate that the court in

> Thompson was simply clarifying the meaning of the statute. Yet the court also stated that when deciding the applicability of a decision to final cases, a "key consideration" is whether prior case law shows that the lower courts were imposing criminal sanctions under the statute in question where none were intended. Klayman, 835 So.2d at 254; Bunkley, 833 So.2d at 745. As examples of decisions that clarified rather than changed the law, the court cited cases in which it could be readily determined from the record that the convictions or sentences had been imposed contrary to the statutes in question as a matter of law, and did not involve factually disputed matters. Klayman, 835 So.2d at 254, n. 8 & 12. In contrast, it cannot be said in this case that the trial court imposed a criminal sanction where none was intended, because the jury might have convicted Barnum of attempted murder of a law-enforcement officer if it had been properly instructed.

Barnum v. State, 849 So.2d 371, 374 -375 (Fla. 1st DCA 2003)(footnote omitted). Nevertheless, the First District certified the following question of great public importance:

> WHETHER THE ANALYSIS OF STATE v. KLAYMAN, 835 So.2d 248 (Fla.2002), APPLIES WHEN AN ISSUE THAT THE SUPREME COURT HAS CLARIFIED REQUIRES RESOLUTION OF A DISPUTED FACTUAL MATTER?

Id. at 365.

SUMMARY OF ARGUMENT

In 1993, respondent was convicted of attempted first-degree murder of a law-enforcement officer. Two years after respondent's appeal was final, this Court issued Thompson v. State, infra., which held that knowledge of the victim's status as a law-enforcement officer is a necessary element of the offense. Respondent filed a motion for post-conviction relief claiming that Thompson should be applied retroactively. The First District erred by granting respondent relief. This Court need not answer the certified question as it is moot. In subsequent cases, this Court has limited Thompson by holding that section 784.07 does not create a substantive offense, but instead, it is a penalty statute. Therefore, the victim's status as a law enforcement officer is not a element of the substantive offense.

Furthermore, the First District's concern that respondent should be entitled to relief under the doctrine of fundamental fairness is misplaced. The First District has overlooked the fact that respondent did not preserve the issue by requesting a jury instruction of his knowledge of the victim's status as a law enforcement officer. Thus, unlike the preserved issue in the case in which this Court provided relief pursuant to the doctrine of fundamental fairness, there is no certainty that had the First District certified conflict in respondent's direct appeal, this Court would have decided it in the manner it did

Thompson, and remanded for a new trial. Hence, respondent is not entitled to any relief, and the First District's decision should be reversed.

ARGUMENT

ISSUE I

WHETHER THE ANALYSIS OF STATE v. KLAYMAN, 835 So.2d 248 (Fla.2002), APPLIES WHEN AN ISSUE THAT THE SUPREME COURT HAS CLARIFIED REQUIRES RESOLUTION OF A DISPUTED FACTUAL MATTER?

The issue before this Court is whether Thompson v. State, 695 So.2d 691 (Fla. 1997), should be applied retroactively.

Standard of Review

The issue of whether a case is applied retroactively is a question of law, and therefore is subject to de novo review.

Argument

Respondent was convicted of attempted first-degree murder of a law-enforcement officer in 1993. At issue is Section 784.07(3), Florida Statute (1991), which provided that:

> Notwithstanding the provisions of any other section, any person who is convicted of attempted murder of a law enforcement officer engaged in the lawful performance of his duty or who is convicted of attempted murder of a law enforcement officer when the motivation for such attempt was related, all or in part, to the lawful duties of the officer, shall be guilty of a life felony, punishable as provided in s. 775.0825.

Thus, "Section 784.07(3) reclassified attempted murder from a first-degree felony to a life felony if the victim was performing his or her duties as a law-enforcement officer." Barnum v. State 849 So.2d 371, 372 (Fla. 1st DCA 2003). In 1991, the First District "had indicated that knowledge of an officer's status was not an essential element of section

784.07(3), when it held that the provision was not unconstitutionally vague for failing to include a requirement that the defendant knew the victim was a law-enforcement officer." Id. at 373. See Carpentier v. State, 587 So.2d 1355 (Fla. 1st DCA 1991). Later, this Court in Thompson v. State, 695 So. 2d 691 (Fla. 1997), held that knowledge of the victim's status as a law-enforcement officer is a necessary element of the offense. The First District held that under the principles of fundamental fairness, Thompson should be applied retroactively because had the First District certified conflict in respondent's direct appeal, this Court would have granted respondent a new trial as it did Thompson. Barnum, at 374. Yet, the First District certified the following question:

> Whether the analysis of State v. Klayman, 835 so.2d 248 (Fla. 2002), applies when an issue that the supreme court has clarified requires resolution of a disputed factual matter?

Id. at 375.

In State v. Klayman, 835 So. 2d 248, 250 (Fla. 2003), the issue was whether or not this Court's decision in Hayes v. State, 750 So.2d 1 (Fla. 1999), interpreting the meaning of the term of mixture in the trafficking statute was subject to retroactive application. In deciding that Hayes did apply retroactively, this court held that "if a decision of a state's highest court is a clarification in the law, due process considerations dictate that the decision be applied in all cases, whether pending or final, that were decided under the

same version (i.e., the clarified version) of the applicable law. Otherwise, courts may be imposing criminal sanctions for conduct that was not proscribed by the state legislature." Id. at 252. This Court's decision was based on the due process concerns of Fiore v. White, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001).

In Fiore v. White, after Fiore's conviction became final, the Pennsylvania Supreme Court interpreted the statute under which Fiore was convicted, for the first time making it clear that Fiore's conduct did not fall within the scope of the statute. 531 U.S. at 226, 121 S.Ct. at 713. The retroactivity of the statute was not at issue, but instead, the issue was whether Fiore's conviction violated the requirements of due process. Id. The statute in question made it unlawful to operate a certain type of facility without a permit. The Commonwealth had only presented evidence that Fiore deviated from his permit, which the Commonwealth assert was the equivalent of acting without a permit. There was no evidence that Fiore did not have a permit. 531 U.S. at 228-229, 121 S.Ct. at 714. However, subsequent to Fiore's conviction, the state high court defined the terms in the statute to mean that one who deviates from his permit is not operating without a permit. 531 U.S. at 227, 121 S.Ct. at 713. Thus, pursuant to the high court's interpretation of the statute there was no evidence to support Fiore's

conviction and it therefore violated due process. 531 U.S. at 228-229, 121 S.Ct. at 714.[1]

These cases are best explained in terms of statutory interpretation. When the legislature has not changed the terms of a statute and the court interprets a term in the statute, the term must have the same meaning from the inception of the statute until the Legislature implements a change to the terms of the statute. Therefore, such application should always be applied retroactively.

However, in Witt v. State, 387 So.2d 922, 931 (Fla.1980), this Court set for its test for determining whether or not a judicial change of law requires retroactive application. This Court stated that an alleged change of law will not be considered for retroactive application unless the change: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Id. at 931. This test for retroactivity is based upon the considerations set forth in Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1967), in which the United States Supreme Court looked to the purpose to be served by the new rule, the extent

[1] Moreover, even if the retroactive application of the statute had been at issue, Fiore came within the exceptions listed in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), because the Pennsylvania Supreme Court's interpretation of the statute had made criminal conduct innocent.

of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule. Stovall, 388 U.S. at 297, 87 S.Ct at 1967.

"A change of law that constitutes a development of fundamental significance will ordinarily fall into one of two categories: (a) a change of law which removes from the state the authority or power to regulate certain conduct or impose certain penalties, or (b) a change of law which is of sufficient magnitude to require retroactive application." Hughes v. State, 826 So.2d 1070, 1073(Fla. 1st DCA 2002). Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (Fla. 1963), is an example of a law change which was of sufficient magnitude to require retroactive application. Witt, at 929. However, this Court also said:

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.

Witt, at 929-930. For example in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), "the Supreme Court refused to give retroactive application to the newly-announced exclusionary rule of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)." Witt, at 929 n.26. To determine if a

change of law is of significant magnitude this court applies Stovall/Linkletter test which "requires an analysis of (i) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice." Hughes at 1073.

The certified question ask this Court to decide whether this Court's decision in Thompson v. State, 695 So.2d 691, 692 (Fla. 1997) was a clarification or interpretation of the terms of the statute or a change of a judicial rule of law. However, this Court has modified its decision in Thompson, and the certified question is now a moot point.

In Merritt v. State, 712 So.2d 384 (Fla. 1998), this Court held that "Section 784.07, Florida Statutes (1995), is an enhancement statute rather than a statute creating and defining any criminal offense." Id. at 385. This Court reiterated this point in Mills v. State, 822 So.2d 1284 (Fla. 2002), stating that "as reflected in the language of the statute itself, section 784.07 operates as a reclassification statute. While the statute does not, in and of itself, create new offenses separate from those to which it makes reference, it does more than provide for minimum sentences applicable to those offenses; it also reclassifies the enumerated offenses based upon the status of the victim." Mills v. State, 822 So.2d 1284, 1286-1287 (Fla. 2002). Thus, this Court has limited Thompson by holding that section 784.07 does not create a substantive

offense, but instead, it is a penalty statute. Therefore, the victim's status as a law enforcement officer is not an element of the substantive offense.

Accordingly, respondent is not entitled to a new trial. At best an Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), error occurred because respondent was sentenced based upon a factor which was not submitted to the jury although this factor increased the statutory maximum for the offense. The issue as to whether Apprendi is entitled to retroactive application is pending before this Court in Hughes v. State, Case No. SC02-2247. See United States v. Sanders, 247 F.3d 139 (4th Cir. 2002); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002); United States v. Brown, 305 F.3d 304(5th Cir. 2002); Goode v. United States, 305 F.3d 378, 385 (6th Cir. 2002); United States v. Moss, 252 F.3d 993 (8th Cir. 2001); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2001); United States v. Sanchez-Cervantes, 282 F.3d 664, 668 (9th Cir. 2002); McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); United States v. Mora, 293 F.3d 1213, 1219 (10th Cir.2002); Untied States v. Aguirre, 2002 WL 188972 (10th Cir. Feb. 7, 2002); Whisler v. Kansas, 36 P.3d 290 (Kan. 2001); Sanders v. Alabama, 815 So.2d 590 (Ala. 2001)(holding that Apprendi is not retroactive).

Additionally, the fundamental fairness concerns of the First District are no longer applicable because knowledge of the victim's status as a law enforcement officer is not an element of the offense. Furthermore, the First District's determination

that had it certified conflict on direct appeal this Court would have granted relief entitling respondent to relief pursuant to Moreland v. State, 582 So.2d 618 (Fla.1991), is incorrect. Barnum, 849 So.2d at 374. The First District has overlooked the fact that the question at issue was preserved in Moreland as well as in Thompson. In Moreland, an administrative order divided Palm Beach County in eastern and western jury district. This Court held that the division resulted in an "unconstitutional systematic exclusion of blacks from the eastern district's jury pool and reversed a defendant's first-degree murder conviction and death sentence in Spencer v. State, 545 So.2d 1352 (Fla.1989)." Id. at 619. However, while Spencer was pending in this Court, Moreland proceeded to trial for first degree murder, and Moreland made the same objection to the jury district as Spencer had. Id. The trial court overruled Moreland's objection, and Moreland was convicted and sentenced to life in prison. Id. Although Moreland raised the claim of the jury districts in his direct appeal, the Fourth District Court of Appeal issued a per curiam affirmance without opinion. Id. This Court stated that: "If Moreland had been sentenced to death, he would have appealed to this Court, rather than the district court, and would have obtained the same result as Spencer, Craig, and Amos.[2] It would be fundamentally unfair to deny Moreland the relief provided by Spencer merely because

[2] Craig v. State, 583 So.2d 1018 (Fla.1991); Amos v. State, 545 So.2d 1352 (Fla.1989).

his sentence directed his appeal to a court other than this one." Id. at 620. Therefore, this Court held that "Spencer should be applied retroactively to Moreland and to persons like him who challenged the Palm Beach County jury districts at trial **and** raised that issue on appeal." Id. (Emphasis added). In fact, this Court specifically stated that had Moreland not made the claim in the trial court and pursued it on appeal "he would not be entitled to relief." Id. at 620 n.3. Thus, crucial to this Court's granting of relief was that Moreland had preserved the issue.

To the contrary, respondent did not preserve the issue by requesting a knowledge instruction in the trial court. In Grinage v. State, 641 So.2d 1362, Fla. 5th DCA 1994), during Grinage's attempted first degree felony murder of a law enforcement officer trial, **over Grinage's objection**, the trial court instructed "[i]t is not necessary for the State to prove that Harold Grinage knew that Kelly Boaz was a law enforcement officer" Id. at 1363 n.1 (emphasis added). Thus, the issue in Grinage was preserved. Furthermore, in Thompson v. State, Thompson had requested a jury instruction on knowledge of the victim's status as a law enforcement officer. Id. at 692. Again, the issue was preserved in both of these cases. Respondent never requested an instruction in the trial court. Accordingly, unlike the preserved issue in Moreland, there is no certainty that had the First District "certified conflict with Grinage in Barnum's direct appeal, the supreme court could have

considered Barnum's case, decided it in the manner it did Thompson, and remanded for a new trial." Barnum v. State, at 374. Hence, respondent is not entitled to retroactive application of Thompson to his case.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 849 So. 2d 371 should be disapproved, and the order entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on September _____, 2003.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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APPENDIX

Barnum v. State 849 So.2d 371 (Fla. 1st DCA 2003)